

1 generally would be too small to put into a
2 regression analysis, that is correct. Is that
3 okay?

4 Q Yes, nine observations is not
5 enough to do a reliable regression analysis;
6 that's correct.

7 A Yeah, if we only had 2008 data
8 that is correct, yes.

9 Q Now one of the things we talked
10 about was the contract or the price that you
11 have used for DIRECTV here. How did you
12 derive that price, Dr. Singer?

13 A Beginning with the surcharge,
14 which is the most important component, and
15 that comes out of the NFL-DIRECTV contract,
16 and that is I believe [REDACTED] per subscriber
17 per month.

18 And if I'm recalling correctly we
19 had what are called remittance reports between
20 DIRECTV and NFL Network that showed the cash
21 flows between the two parties. And from that
22 we tried to figure out what the base rate was

1 to layer on top of the [REDACTED] surcharge.

2 Q So looking here we've got about [REDACTED]

3 [REDACTED] or something, or [REDACTED] for DIRECTV.

4 You're saying about [REDACTED] - or [REDACTED],

5 rather, is the game surcharge, and the

6 balance, say [REDACTED], is the base rate; is

7 that right?

8 A Correct.

9 Q Now have you actually looked at

10 the contract between DIRECTV and the NFL?

11 A You have to specify which one.

12 The one that I just looked at probably a few

13 days ago was the renewal contract. Is that

14 the one you are asking about?

15 Q Well, you didn't use that. That

16 contract doesn't apply to this time period,

17 the renewal contract, does it?

18 A It does not. I'm sorry, I was

19 just trying to figure which -

20 Q For the period that covered your

21 regression analysis, the contract was the 2004

22 DIRECTV-NFL contract.

1 A The sounds right.

2 Q Did you look at that 2004 DIRECTV-
3 NFL contract?

4 A Yes, I did, as well as my staff,
5 which was tasked with putting together the
6 database, yes.

7 Q And was there anywhere in that
8 contract a specification of what the base rate
9 was for the NFL Network?

10 A I don't believe a specification.
11 Like I said the only thing that was specified
12 was the surcharge. I believe the rules for
13 how the base rate would be established and
14 then got implemented through these remittance
15 reports - I believe there was some language to
16 that effect, if I am recalling correctly.

17 But I grant you that they did not
18 agree to that [REDACTED] base rate in that
19 contract.

20 Q In fact the contract left the base
21 rate completely at the discretion of the NFL?

22 A I'm reluctant to weigh in on that

1 aspect, because it sounds more legal than
2 economic. But I'm happy to assume it for the
3 purposes of the questions.

4 Q Let's step back for a second.
5 This was a contract that covered not just the
6 NFL Network but also the Sunday Ticket, right?

7 A Correct.

8 Q It was a bundled contract, right?

9 A Yes, in fact DIRECTV got a bundled
10 rate. That is, they got a less than market
11 rate for this programming. I know you don't
12 like it, but it is actually helping you in
13 this analysis.

14 Q You don't have to characterize
15 whether I like it or not. I'm not sure I even
16 understand why I would like it or not,
17 frankly.

18 A Because you like lower rates, all
19 things equal.

20 Q But what I'd like to understand
21 is, how do you separate out the price that is
22 being paid for the Sunday Ticket versus the

1 price to be paid for the NFL Network if it's
2 all bundled together in this contract?

3 A Because they stipulated the most
4 important component, which is the surcharge at
5 ■■■■■ And then we actually get to see
6 remittance reports that specify what the
7 implementation of the base rate charge was.

8 The fact that it was bought
9 pursuant to a bundle to me tells me one thing,
10 that they got a bundled rate; that they got a
11 cheaper rate for it. And that is borne out by
12 the fact that DIRECTV is less than market.

13 Q Do you recall what the bundled
14 price was for the NFL Network and the Sunday
15 Ticket?

16 A ■■■■■, but I can't
17 remember with more precision than that.

18 Q Does ■■■■■ sound about
19 right?

20 A That sounds about right.

21 Q And basically the allocation
22 between the Sunday Ticket and the NFL Network

1 was totally left at the discretion of the NFL,
2 right?

3 A No, again, the [REDACTED] was
4 stipulated in the contract. The only
5 discretion that I understand they had was over
6 the base rate.

7 Q Which was [REDACTED]

8 A Which was [REDACTED]

9 Q If you had set that at zero, this
10 would have been a lot less expensive than the
11 programming, right?

12 A Had the base rate been zero we
13 would see the surcharge only at [REDACTED]
14 that's correct.

15 Q And the base rate, if the base
16 rate had been set at [REDACTED] then you'd have a
17 much higher bundled rate here as well?

18 A That is correct.

19 Q And the NFL had total discretion
20 what that price would be, what it would set
21 that base rate as, didn't it?

22 A Again, I'm happy to assume that.

1 I'm reluctant to say that I know that as a
2 matter of contract because I'm an economist.
3 But I'm happy to grant you that for the
4 purposes of the next question.

5 Q Sure. Why don't we look at the
6 contract. This is Comcast 321, if I may Your
7 Honor.

8 JUDGE SIPPEL: Three twenty one.
9 And let's describe this. Again we are on the
10 letterhead of National Football League, dated
11 November 8, 2004. We haven't seen this
12 before, have we? Or have we?

13 MR. BURKE: I don't believe we
14 have, Your Honor, although it was marked and
15 admitted as a Comcast exhibit.

16 JUDGE SIPPEL: Well, if it was
17 already marked and admitted -

18 MR. BURKE: I'm sorry.

19 JUDGE SIPPEL: Hold on just a
20 second. Yes, it's the same document, Comcast
21 321. Yes, we already have this in.

22 MR. BURKE: Okay, great, that's

1 what we thought, Your Honor.

2 JUDGE SIPPEL: So you can give

3 him a copy of it.

4 MR. BURKE: We just brought our

5 two copies, because we didn't know if people

6 would have it.

7 JUDGE SIPPEL: Appreciate it.

8 BY MR. BURKE:

9 Q First off, do you recognize this
10 document, Dr. Singer?

11 A I believe I do, yes.

12 Q And so you reviewed this in part
13 of your preparation of your work on this
14 matter?

15 A Yes, I did.

16 Q And I want to point you to page
17 two of the actual agreement, and it's Section
18 2, rights fees, NFL Network.

19 A Yes, I'm there.

20 Q In 2a, it says total nominal
21 payment of [REDACTED] [REDACTED] for all rights
22 described herein except for NFL Network

1 surcharges. Do you see that?

2 A A very important section, yes.

3 Q For a 5-year period, so that the
4 bundled price for the NFL Network and the
5 Sunday Ticket is [REDACTED] putting aside
6 the game surcharge; right?

7 A Correct.

8 Q So for this [REDACTED] price,
9 DIRECTV got two things. It got, first, the
10 Sunday Ticket, and secondly, it got the NFL
11 Network, it got the games, the base price of
12 the NFL Network, right?

13 A I would say they also got the NFL
14 - with that - okay, that is a fair
15 characterization. They certainly have the
16 rights to the games as well on the eight-game
17 package.

18 Q So then if we go to 2b, it says,
19 basic NFL network carriage fees, i.e. carriage
20 fees other than the surcharge for carriage of
21 live regular games, for the period listed, may
22 be determined by NFL enterprises in its

1 reasonable discretion; do you see that?

2 JUDGE SIPPEL: Where are you
3 reading from?

4 MR. BURKE: I'm sorry, from 2b,
5 Your Honor.

6 JUDGE SIPPEL: On the next page?

7 MR. BURKE: No, it's on the same
8 page.

9 JUDGE SIPPEL: I have it, thank
10 you.

11 BY MR. BURKE:

12 Q But just to read it again, it
13 says, basic NFL Network carriage fees. That
14 is the base rate that DIRECTV has to pay for
15 the NFL Network, right?

16 A Correct.

17 Q Those basic fees may be determined
18 by the NFL Enterprises in its reasonable
19 discretion; do you see that?

20 A Yes.

21 Q So what that is saying is, the NFL
22 can set that base rate at any point it wants,

1 whether it's [REDACTED]
2 right?

3 A Yes, it has a certain amount of
4 discretion to set the base fee that is layered
5 on top of the [REDACTED] surcharge.

6 Q And then it says, DIRECTV's
7 payments to NFL Enterprises in respect of any
8 basic carriage fees will be credited against
9 the rights specified in 2a. Do you see that?

10 A Right.

11 Q So do you understand that to mean
12 that whatever the base rate is paid, will be
13 credited as part of the [REDACTED], right?

14 A Yes.

15 Q So isn't it completely arbitrary
16 what the NFL sets that base rate at? It could
17 have been any number, and it would all just
18 come out of the [REDACTED], one way or
19 another?

20 A It's not arbitrary. Look at where
21 it ended up setting it. I grant you that they
22 had discretion to set it arbitrarily. But at

1 the end of the day they brought DIRECTV to
2 market.

3 The way that I would explain this
4 to you is that the [REDACTED] was well below
5 market rate for the surcharge, right? If
6 everyone is paying [REDACTED], why is DIRECTV
7 getting the surcharge for [REDACTED]? The
8 answer is, because it was part of a bundled
9 rebate, and when they have to come up with the
10 rate they add back on [REDACTED] and look where
11 it takes them? It takes them back to market.

12 Q Or, isn't it equally plausible to
13 infer, Dr. Singer, that the NFL wants to make
14 the NFL DIRECTV rate as high as possible so it
15 can justify a high rate for MVPDs?

16 A There is a - that is a double-
17 edged sword. Because as they move money from
18 the [REDACTED] towards the NFL Network to allegedly -
19 I don't think they are doing this, but if
20 that was their strategy was to get DIRECTV
21 signed, which by the way occurred after Dish
22 Network had established the lower price - if

1 that is their strategy, it is a double-edged
2 sword. As you move money towards NFL Network
3 you are taking away money from the ticket.
4 And as you know the ticket renewal comes up
5 every few years as well. And I'm fairly
6 confident that the NFL Network when
7 negotiating with Comcast and Time Warner
8 jointly for the NFL ticket loves to be able to
9 point to a very high number for the NFL
10 ticket, for when they are negotiating those
11 rights on a going forward basis.

12 Q How would Comcast even know what
13 DIRECTV is paying for the Sunday Ticket? I
14 mean this is a highly confidential document,
15 isn't it?

16 A This document is confidential, but
17 I can't rule out the possibility that the
18 amount that NFL Network got for the ticket
19 never made it into the public domain; I can't
20 rule that out.

21 Q But this allocation as between
22 whether you are going to put it into Peter's

1 pocket or Paul's pocket here, whether you are
2 going to allocate it to the base rate or to
3 the NFL Sunday Ticket, Comcast has no
4 visibility into that. How would Comcast ever
5 know that?

6 A Well, I would think that when
7 Comcast went to negotiate with NFL at the
8 renewal for the ticket that it would be
9 reasonable for them to ask what the price was
10 for the last ticket, and it would be
11 disingenuous for the NFL to claim credit for
12 the [REDACTED] if in fact it allocated a certain
13 percentage of that over to a different pot.

14 But you are asking me how does it
15 happen? I've never sat through one of those
16 negotiations. I don't know how they happen.

17 Q So you really are speculating,
18 right, Dr. Singer?

19 A I'm not - I don't know if I'm
20 speculating. You asked me do they have
21 incentives to game the system by jacking up
22 the base rate so as to get a higher - if I

1 understand you right - so as to get a higher
2 DIRECTV price for the NFL Network, and then
3 shot that price around.

4 And I'm just pointing out that
5 it's a double-edged sword. And the second
6 thing I'm pointing out is that a lot of these
7 deals were cut before the DIRECTV deal.

8 Q There is no specification of what
9 the base rate is in this contract. It is
10 purely at the NFL discretion, right?

11 A It's at the discretion, but we see
12 how much discretion they exerted.

13 Q And the NFL has an incentive, for
14 the purposes of this litigation and otherwise,
15 to make the base rate that DIRECTV is paying
16 appear as high as possible, doesn't it?

17 A I can't accept the notion that
18 this litigation had anything to do with how
19 they allocated and calculated the remittance
20 reports; I can't accept that.

21 Q Well, don't they have an incentive
22 to make it appear as high as possible?

1 A I think ex post, now that we are
2 haggling over the right price, it certainly
3 benefits the NFL Network to have [REDACTED] in
4 there as opposed to [REDACTED]. But whether or not
5 they did the allocation with that in mind I
6 can't speak to that, in fact it seems
7 unlikely.

8 Q All right, but you don't have any
9 personal knowledge one way or the other?

10 A They'd have to have amazing
11 foresight to do that.

12 Q Well, they can increase the base
13 rate too, right?

14 A You can't go back and - I'm
15 dealing with a set of documents, remittance
16 reports from 2004. I don't know how the NFL
17 could go back in time and arbitrarily move
18 things around so that their expert could get
19 a higher number.

20 Q Those remittance reports reflect
21 the fact that the base rate is increasing over
22 time, don't they?

1 A Sure, as they are for everyone.

2 Q And how does that increase - there
3 is no formula in this contract for how that
4 increase occurs. It just happens at the
5 discretion of the NFL, right?

6 A It happens at the discretion, but
7 to the best of my ability as an economist,
8 what I think the NFL is doing is that they are
9 trying to get back up for the extreme rebate
10 that DIRECTV got for the surcharge. If you
11 look at the price of the surcharge, you have
12 this [REDACTED]

13 [REDACTED]. What I think
14 they are doing is, they're marking it to
15 market. They're putting a rate that puts it
16 at [REDACTED]. I think that is what they are doing.

17 Q But you don't have any personal
18 knowledge one way or the other of why they are
19 doing it?

20 A I don't have personal knowledge of
21 why they are doing it.

22 Q This is totally speculation on

1 your part, right?

2 A It's not speculation. I'm giving
3 you an economic interpretation of why I think
4 they are doing it.

5 Q So you had no conversations with
6 anyone at the NFL Network about how they set -
7 or the NFL for that matter - about how they
8 set this base rate for DIRECTV?

9 A I can't recall specifics of any
10 conversation on that.

11 Q For example, did you ask them are
12 there any studies that support your selection
13 of [REDACTED] as the base rate?

14 A I would never ask that question
15 because there wouldn't be a study to support
16 that.

17 Q So you didn't ask the question?

18 A Not that question.

19 Q You didn't ask for any
20 documentation to support why the NFL selected
21 [REDACTED] as its base rate in its discretion?

22 A No, I did not.

1 Q Okay. I want to talk a little
2 bit, to change the subject for a moment -
3 JUDGE SIPPEL: Well, before you
4 do, am I understand that the base rate - I'm
5 talking about this exhibit now, the numbers
6 here on number two, rights, fees, et cetera,
7 that the base rate is [REDACTED], so the
8 surcharge would be what, it would be [REDACTED]?
9 An I right?
10 THE WITNESS: Right. If you were
11 to decompose the DIRECTV rate, and it looks
12 like it's about 61 cents.
13 JUDGE SIPPEL: Yes, that's what
14 we talked about yesterday.
15 THE WITNESS: So for DIRECTV,
16 which I think is a very special case -
17 JUDGE SIPPEL: DIRECTV, yes.
18 THE WITNESS: It's a very special
19 case.
20 JUDGE SIPPEL: Right, it's very
21 elaborate one.
22 THE WITNESS: The allocation is

1 ■■■■ for the surcharge and the residual to
2 the base. Now there could also be marketing
3 subsidy that I don't want to rule out too. We
4 have to go into my Excel spreadsheet that
5 shows you the decomposition of the ■■■. But I
6 think it's fair to say as a first cut, ■■■
7 ■■■■ ■■■.

8 JUDGE SIPPEL | ■■■■■ All
9 right. Okay, thank you. I just want to be
10 sure of my scorecard. Thank you.

11 MR. BURKE: Just a few final
12 questions and then we'll finish up. Your
13 Honor, you were thinking about finishing up
14 around noon today?

15 JUDGE SIPPEL: That's all up to
16 the good doctor.

17 MR. BURKE: I think we can finish
18 this up in about 10 minutes.

19 BY MR. BURKE:

20 Q Dr. Singer, you rely upon an
21 economic theory that is referred to as raising
22 rivals' cost. Do you remember that?

1 A Yes.

2 Q And that is basically an antitrust

3 theory, right?

4 A It is an antitrust theory; it is.

5 Q And you actually used that theory

6 at one point to analyze vertical foreclosure

7 of local programming in an article you wrote

8 with Dr. Sidak; do you remember that?

9 A I've written several with him.

10 I'm not sure if you are talking about the

11 Internet one or the video programming one; I'm

12 sorry.

13 Q I think you referred, when earlier

14 in your direct testimony, to an article you

15 had written with Dr. Sidak concerning vertical

16 foreclosure theories using this concept of

17 raising rivals' costs.

18 Which article were you referring

19 to then?

20 A Oh, I probably was referring to

21 the Journal of Network Economics article.

22 Q Is it Review of Network Economics?

1 A That sounds right.

2 Q And when you wrote that article,
3 you were applying this concept of raising
4 rivals' cost, that antitrust theory, to
5 vertical foreclosure, in video programming
6 markets, right?

7 A I wouldn't say that is the thrust
8 of the article, but it's possible that I
9 employed raising rivals' cost as the theory in
10 that article.

11 Q Was there some other economic
12 theory that you applied in that article?

13 A Yes, I'm happy to -

14 Q Is there a name for it or some
15 shorthand -

16 A Well, when you - I think we were
17 looking at regional sports programming. I'm
18 sure you will remind me. I think it was based
19 on my work in the MASN case.

20 The MASN was threatened with a
21 refusal to be carried in the Washington DMA,
22 and that conduct or that exclusionary conduct

1 didn't necessarily raise MASN's cost, it just
2 prevented them from achieving certain scale
3 that would otherwise induce them to exit the
4 market.

5 Q Just out of curiosity, has the NFL
6 reached its minimum viable scale, NFL Network?

7 A I haven't studied that particular
8 issue, but I think it's fair to assume that
9 they have reached a minimum viable scale.

10 Q Now in your article on vertical
11 foreclosure, and why don't we just distributed
12 so everyone has it.

13 MR. BURKE: If I may, Your Honor,
14 this is marked for identification Comcast
15 Exhibit 426. It's an article by Dr. Singer
16 entitled vertical foreclosure in video
17 programming markets.

18 JUDGE SIPPEL: So marked.

19 (Whereupon the aforementioned
20 document was marked for
21 identification as Comcast Exhibit
22 No. 426)

1 JUDGE SIPPEL: What is the date
2 on that?

3 MR. BURKE: September, 2007.

4 JUDGE SIPPEL: That will be
5 marked then as Comcast Exhibit No. 426 for
6 identification.

7 BY MR. BURKE:

8 Q Dr. Singer, can you identify this
9 document?

10 A Yes, I can.

11 Q This is the article that we were
12 just talking about, right?

13 A Correct.

14 Q If you turn to the last - actually
15 page 391, your conclusions. I wanted to read
16 the first two sentences of your conclusion.

17 You say, vertical foreclosure
18 theories depend critically on the relevant
19 geographic market. A local downstream access
20 provider, whether it is a cable television
21 provider or a cable modem provider, lacks the
22 ability to foreclose an upstream content

1 provider that generates content with

2 nationwide appeal.

3 See that?

4 A Yes.

5 Q And is it your view that NFL

6 Network is an upstream content provider that

7 generates content with nationwide appeal?

8 A Yes.

9 Q So doesn't this conclusion

10 indicate that it's impossible for a local

11 access provider like Comcast to successfully

12 foreclose the NFL Network?

13 A What I will grant you is that if

14 this were antitrust case, and we were arguing

15 the case under the antitrust laws, the

16 foreclosure share, which is - to the extent to

17 which Comcast can block NFL from its potential

18 audience would become a very important

19 element.

20 You don't like when I weigh in on

21 the law, but I understand that we are trying

22 to form here a second prong of the